

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

MOHAMMED F. FOKHOR

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DETERMINATION

TAT (H) 08-14 (RP)

Murphy, A.L.J.:

Petitioner, Mohammed F. Fokhor, filed a Petition with the New York City ("City") Tax Appeals Tribunal ("Tribunal"), dated May 25, 2008, protesting a February 26, 2008 Notice of Determination of City Real Property Transfer Tax ("RPTT") imposed with respect to the June 7, 2005 transfer ("Transfer") of real property located at 57-72 Xenia Street, Corona, NY 11368, Queens County Block 1949, Lot 177 ("Property").

A Hearing was held on January 21, 2009, where testimony was taken and exhibits were submitted. Petitioner was represented by Philip J. Bornstein, Esq. The Commissioner of Finance ("Commissioner") was represented by Amy Bassett, Esq., Assistant Corporation Counsel.

Following the Hearing, at the request of the undersigned, representatives for the parties submitted additional correspondence and documents. On January 22, 2009, Petitioner's representative submitted a copy of a letter to an unrelated company, requesting a public records search.¹ On April 29, 2009, Ms. Bassett submitted

¹ The response to this request was submitted as Petitioner's Exhibits 4 and 5.

the affidavits of two City employees.² On May 5, 2009, the undersigned informed the parties that the affidavits would be admitted as Respondent's Exhibits B and C, and the record was closed.

Petitioner filed a Brief on June 15, 2009, and Respondent filed a Brief on August 31, 2009. Petitioner submitted a Reply Brief on September 15, 2009 and, on October 28, 2009, Respondent filed a Sur-Reply Brief.

ISSUE

Whether at the time of the Transfer, the Property was comprised of three units, taxable at the rate of 1.425% of the purchase price pursuant to RPTT §11- 2102(a)(9)(i), or four units, taxable at the rate of 2.625% of the purchase price pursuant to RPTT §11-2102(a)(9)(ii).

FINDINGS OF FACT

The Property, located at 57-72 Xenia Street, Corona, New York, and identified on City records as Queens Block 1949, Lot 177, was built in 1988. A Certificate of Occupancy was issued on January 8, 1988 (#207260) stating that the Property is a 3-family house.

² On March 18, 2009, Ms. Bassett submitted a letter detailing her discussions with personnel in two City agencies and requested that it be admitted into evidence. By letter of the same date, Mr. Bornstein objected to the admission. Ms. Bassett responded on March 23, 2009, renewing her request that the letter be admitted and requesting the opportunity to submit additional documents. Petitioner's representative objected to this request in writing on March 25, 2009. On the same date, the undersigned issued a Notice advising the parties that the record remained open, and recounting the noted correspondence. Ms. Bassett was given until April 29, 2009 to provide the affidavits.

From 1988 to September 19, 1999, the Department of Finance ("Department" or "Respondent") classified the Property for City Real Property Tax ("RPT") assessment purposes as a "C0" or three-family dwelling which is a Tax Class 1 property.³

On September 20, 1999, the Property was reclassified by Respondent as a "C3" or four-family dwelling. The Property was classified as a Tax Class 2A property⁴ on the City 2000/2001 Tentative Assessment Roll (effective January 15, 2000) and Respondent still classifies the Property as a Tax Class 2A.

Prior to the Transfer, the Property was sold twice: in 2002 and then in 2004. City RPTT Returns were filed for each of these sales, and the parties stipulated that each filing reported that the property was a 3-family dwelling.

On June 7, 2005, Petitioner Mohammed F. Fokhor and Aklima Akhtar Nasima, his wife, purchased the Property from Hasera Bibi, for \$850,000 ("Purchase").⁵

Petitioner's address was listed on the Contract of Sale as 21-27 27th Street, Astoria NY 11105.

³ NY Real Property Tax Law ("NY RPTL")§1802.1(a). Class one property includes "all one, two and three family residential real property . . ."

⁴ Class two property is defined as "all other residential real property which is not designated as class one." NY RPTL §1802.1. The Department assigns property to one of four classes: Class 1 is comprised of "[M]ost residential properties of three units or less;" Class 2 is comprised of "[A]ll other property that is primarily residential" See, http://www.nyc.gov/html/dof/html/property/property_val_assesment.shtml. Class 2 property is further divided into three subclasses: "2a (rentals with 4-6 units); 2b (rentals with 7-10 units); and 2c (condos with 6-10 units)." *Id.*

⁵ The Contract of Sale indicates that the purchase price was \$850,000, which was adjusted by a downpayment of \$10,000 and a "seller's concession" of \$45,000 for a net purchase price of \$795,000. The purchase price for purposes of the transaction and filings at issue is \$850,000.

The Tenancy Schedule appended to the Contract of Sale for the Purchase described the Property as follows:

Basement	vacant
1 st Floor	tenant
2 nd Floor	tenant
3 rd Floor	tenant.

The Contract identified certain appliances as personal property: "4 range [sic], oven, 5 refrigerators." A handwritten notation on the contract indicated that 4 refrigerators were "working" and provided for credit at closing if an appliance was not working.

A copy of a Uniform Residential Loan Application, requesting financing for the Purchase, stated that there were three (3) units at the Property.

The Deed filed with respect to the Purchase stated that the Property was a "Dwelling Only - 3 Family."

A September 26, 2008 real estate Multiple Listing indicated that the Property was comprised of three floors and a basement which was "Full Finished." The listing stated that there were three kitchens, three stoves and three refrigerators.

On June 7, 2005, Petitioner filed a City RPTT Return with respect to the Transfer, which identified the Property as a "1-3 family house;" the sales price was listed as \$850,000; and RPTT was calculated to be \$12,112.50, based on application of a tax rate of 1.425% to the purchase price. Petitioner paid this amount.

On January 15, 2006, Respondent issued a Notice of Property Value to Aklima Akhter Nasima⁶ for the Tax Year July 1, 2005 to June 30, 2006 (a period following the Transfer). The Notice was addressed to Ms. Nasima at "2127 27th St., LI City NY 11105-3071." The Notice stated that the Property was classified as "2A" with four residential units. The Property was valued for City RPT purposes as follows: market value: \$653,471; assessed value: \$33,335; taxable value: \$31,645. The Notice specifically informed Ms. Nasima that the values could be challenged by application to the City Tax Commission.

Petitioner did not file an application for, or otherwise request correction of, the City assessment valuation prior to these proceedings.

George King, Supervising Assessor, Tier 3, with the Department of Finance's Real Property Assessment Bureau, testified at the hearing concerning the general practices of the Department for assessing and reclassifying real property. Mr. King was not involved in assessing or reclassifying the Property.

Mr. King testified that the Department will reclassify a property when it appears to an assessor during the course of inspection that the Property is different from its assessment classification. Reclassification may occur as a result of an actual physical inspection of the inside and outside of a structure, a physical inspection of certain external items such as

⁶ The spelling of Petitioner's wife's name is inconsistent throughout the exhibits. For example, the Notice of Value, other computer documents generated by Respondent contained in the audit file, and the RPT Return identify Petitioner's wife as Aklima Nasima Akter or Aklima Nasima Akhter; the Contract of Sale identifies her as Aklima Akter Nasmia; the Notice of Determination identifies her as Aklima Nasima Aktar; Stipulation ¶3 identifies her as Aklima Naslma Akhter.

water meters, door bells, mailboxes, call directories, etc., or an exterior visual inspection.

Property owners are notified of property reclassification only when they receive their annual Notice of Value and a separate notice of reclassification is not issued. An owner who disagrees with the reclassification must request review by Respondent, or by application to the City Tax Commission.⁷ In response, a City assessor, accompanied by the property owner or representative, will physically inspect the property. No review or inspection of the Property was ever requested by Petitioner or performed by the Department following the 1999/2000 reclassification of the Property.

In August 1999, the City Department of Housing Preservation and Development (HPD) inspected the Property. The HPD Inspection Order, which was submitted at hearing, identified the Property as a 3-story, 3-apartment building. Subsequently, in May 2002 HPD issued an Inspection Order for the Property which was also submitted at hearing and which identified the Property as a 3-story, 3-family apartment building. In November 2007 HPD issued a Closed Violation Summary for the Property, which was submitted at hearing and which also identified the Property as a 3-unit, 3-story structure.

Respondent submitted the Affidavit of Mario Ferrigno, the Assistant Commissioner for the HPD Division of Code Enforcement, Office of Preservation Services. Mr. Ferrigno reviewed the referenced HPD records. He affirmed that the statements in these records referring to the number of apartments at the Property did

⁷ See, Ex. A, p. A14.

not seem to be "the result of inspection by employees of HPD." Further, he affirmed that in general the "number of apartments indicated [on HPD reports]. . . are generated electronically from HPD's inspections database, which obtained the number of apartments from the Department of Finance prior to 1999."

The City Department of Environmental Protection (DEP) maintained records of water usage for the Property. DEP records for 2003 and 2008 were submitted at hearing, listing the Property as a "3-story, 3-fam. Dwlng [sic]."

Respondent offered the affidavit of Kayeterina Murchinson, Management Analysis/Legal Liaison with DEP. Ms. Murchinson reviewed the submitted DEP records. She affirmed that the inspections occurred and stated that it is "not the standard practice of DEP inspectors to count the number of apartments." She further affirmed that it is "not the standard [DEP] practice to inspect a property with regard to the number of apartments unless the property is billed based on the number of apartments, which is when a property is billed based on frontage." Finally, she stated that the Property was a metered building and was not billed by DEP based on frontage. She suggested that the reference to the number of apartments may have been based on the inspectors "observation" of the number of stories.

Respondent's auditor, Clara Ofikuru, reviewed the RPTT Return filed by Petitioner, as well as other documents pertaining to the Purchase and to the Property, and concluded that the Property was a four-family house.

On February 26, 2008, Respondent issued to Petitioner a Notice of Determination of RPTT due on the June 7, 2005 Transfer, in the

base tax due amount of \$14,083. Applying the tax rate of 2.625% to \$850,000 consideration, RPTT liability was computed to be \$22,312.50. Petitioner's payments of \$12,112.50 were credited against the base tax amount. Interest of \$2,965.27 was computed (to March 27, 2008) and a late-filing penalty of \$918 was asserted.

Petitioner protested the Notice and the matter was scheduled before Respondent's Conciliation Bureau. On May 22, 2008, the Conciliation Bureau issued a decision discontinuing the proceedings.

On May 30, 2008, Petitioner filed a Petition protesting the May 22, 2008 Conciliation Decision.

STATEMENT OF POSITIONS

Petitioner asserts that the transaction at issue was the purchase of a 3-family dwelling, subject to the RPTT calculated at a rate of 1.425% applied against the purchase price of \$850,000. Therefore, Petitioner asserts that the appropriate amount of RPTT has been paid.

Respondent asserts that the appropriate RPTT rate for the Transfer is 2.625% as it was the purchase of a four-family dwelling and therefore, Petitioner owes additional RPTT.

CONCLUSIONS OF LAW

RPTT is imposed on the transfer by deed of City real property for consideration over \$25,000 at the time the deed is delivered to the grantor. Code §11-2102(a). Real property transfers are taxed at a rate equal to a percentage of the consideration for the

transfer. The percentage is determined by the date of the transfer, the characteristics of the building, and the amount of the consideration. Code §11-2102(a)(9). 2005 transfers of one-, two-, and three-family houses for consideration over \$500,000, are taxed at a rate of 1.425% of the consideration; transfers of houses with more family units for the same threshold consideration are taxed at 2.625%. Code §11-2102(a)(9)(i),(ii).

Although the Certificate of Occupancy ("C of O") indicates that the Property was constructed as a three-family dwelling, tax due on the Transfer is not determined by that classification. See, FLR #034805-021, June 25, 2003, which states: "[I]n the absence of information suggesting the Department's real property tax classification is incorrect, that classification, and not the C of O is controlling for RPTT purposes."

The assessed value of real property for purposes of the City RPT supports Respondent's computation of City RPTT due. The RPT is computed by application of an assessment ratio to market value, with specific limitations and adjustments which are not germane to this proceeding.⁸ In the case of Class 1 property the 2005 assessment ratio is 6%; in the case of Class 2A, the ratio is 45%.⁹ The 2006 Notice of Value for the Property indicates that the Property was classified as 2A and was comprised of "4 units residential."

No photographic or other descriptive evidence of the actual physical composition of the Property was introduced into the record. Except for a picture of the front of the Property on the

⁸ See, fn 4, *supra*.

⁹ *Id.*

Multiple Listing page, as one structure in a row of contiguous similar structures on Xenia Street, no interior or exterior pictures were offered by either party. Petitioner did not request an inspection of the Property nor did Respondent perform one.

Petitioner never protested the annual RPT assessment, from the date of purchase to the present. The classification of the Property as a 2A structure appears prominently in every Notice of Value, as does the description of the Property as a four-family dwelling and the provision that the assessment may be challenged. Further, there is no indication that the RPT had not been paid as assessed. Given the above, it is not credible that Petitioner was not aware of Respondent's classification.¹⁰

Petitioner presented no witnesses at hearing and there was no testimony to the composition of the Property.

Petitioner did not meet its burden to prove that the assessment at issue was incorrect. Respondent correctly argues that the statements of personnel employed in other City agencies concerning the configuration of the Property were conclusory and were not based on actual inspection or other physical confirmation; this position is supported by the affidavits of Mr. Ferrigno and Ms. Murchinson.

Based on Mr. King's uncontroverted testimony concerning the standard practices of the Department of Finance, it is concluded that there was an inspection of the Property by Respondent some time in 1999 which occasioned the RPT reclassification. Therefore,

¹⁰ Petitioner's representative suggests in his reply, that Petitioner never received the Notices of Value, but this allegation was not supported, and therefore it is assumed that Petitioner was on notice of the information contained in the Notice of Value.

Respondent has established a rational basis for its Notice. The fact that after 1999 none of the owners of the Property, including Petitioner, appear to have challenged the Notice of Value reclassification mitigates against Petitioner's position.

Petitioner has not established that Respondent's determination that the Property is a four-family dwelling is incorrect.

ACCORDINGLY, IT IS CONCLUDED THAT the Transfer was of a four-family property, subject to the RPTT at a rate of 2.625% applied against the purchase price. The Notice of Determination dated February 14, 2008 is sustained and Petitioner is liable for the RPTT to the extent of the amount assessed which is in excess of the RPTT paid upon filing the deed.

DATED: April 27, 2010
New York, New York

ANNE W. MURPHY
Administrative Law Judge